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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 820

JOHN WAYNE LYLES, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) is reported at 249 F. 2d 744.

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1957. A petition for rehearing was denied on January 30, 1958. The petition for a writ of certiorari was filed on February 28, 1958. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly instructed the jury as to accomplice testimony.

2. Whether the failure of the government to call a witness available to both sides raised an inference unfavorable to the government which vitiates the conviction.

STATUTE INVOLVED

18 U.S.C. 2314 provides in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; * * *
>
> * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

On May 10, 1957, in the United States District Court for the Southern District of Texas, petitioner was convicted of transporting in interstate commerce from New Orleans, Louisiana, to Houston, Texas, $22,000.00 in United States currency, knowing it to have been stolen, in violation of 18 U.S.C. 2314 (R. 6, 302, 303). Petitioner was sentenced to 8 years imprisonment (R. 303). On appeal his conviction was affirmed (Pet. 19-24).

The evidence showed that, in 1955, Evelyn McCarthy, a prostitute, was living in Houston, Texas, with her husband, Doris Andrews and the petitioner (R. 48, 50, 51, 60, 61). In August 1955, Mrs. McCarthy met a man named Peterson and spent the

night with him at the Rice Hotel in Houston, Texas (R. 50). Peterson was identified by an Assistant Cashier of the Inland Empire Bank in Umatilla, Oregon, as Jack Hill, one of the men who robbed the bank of $57,000 on August 22, 1955 (R. 25-57).

While spending the night with Hill, Mrs. McCarthy discovered that he was carrying a large sum of money in a zipper bag (R. 52). The next morning when she reported this to her husband he told her to return to the hotel and get some more money. She rejoined Hill at the Rice Hotel (R. 66). Ralph McCarthy and petitioner sent Doris Andrews (now Doris Andrews Grouches) to the hotel room to find out what Mrs. McCarthy "was doing, and how long she was going to be up there" (R. 112). She learned that Mrs. McCarthy and Jack Hill were planning to go to Lake Charles, Louisiana, that same day (R. 67, 69, 70, 114). Doris Andrews joined petitioner and Ralph McCarthy who were waiting for her and they all went back to Ralph's home to await an expected telephone call from Mrs. McCarthy (R. 115, 116).

Shortly after Doris Andrews left the hotel, Mrs. McCarthy and Jack Hill took a taxi to the airport (R. 50). They discovered that they had missed the plane for Lake Charles, Louisiana, and instead took a plane to New Orleans, Louisiana (R. 50, 51). Shortly after checking in at a New Orleans hotel, Hill and Mrs. McCarthy heard a knock at the door. When Hill answered, the petitioner, Doris Andrews, and Ralph McCarthy came into the room in "kind of a rush" (R. 55, 56). The testimony revealed that, after waiting at the McCarthy home for Mrs. McCarthy to telephone, petitioner, Ralph McCarthy and

Doris Andrews decided to go "uptown to see what had happened" (R. 116). On learning that Hill and Mrs. McCarthy had gone to New Orleans the three flew immediately to New Orleans (R. 117, 118). In a conversation with a taxi cab driver in New Orleans they discovered the hotel at which Hill and Mrs. McCarthy were staying and checked in at the same hotel (R. 118, 119). After petitioner and Ralph McCarthy "messed up the covers" in their room and posted Doris Andrews as a lookout at the elevator, they gained entry to the room in which Hill and Mrs. McCarthy were staying (R. 120, 121). The three intruders (Doris Andrews entered once the door was open) forced Hill to lie down on the floor and covered his head with a pillow (R. 56). After locating the zipper bag containing the money, the three and Mrs. McCarthy left the hotel with the zipper bag (R. 57, 122, 123). All four returned to Houston by cab. In the McCarthy house in Houston petitioner and Ralph McCarthy counted and divided the money (R. 58, 123). Petitioner and Ralph McCarthy then burned the zipper bag that had held the money and also the dress that Mrs. McCarthy had worn that day (R. 124).

The two women involved in the venture were the principal government witnesses. In addition a bell hop at the Rice Hotel testified that he saw Hill (known to him as Peterson) and Mrs. McCarthy together at the hotel and at the request of Hill purchased a zipper bag for him and made plane reservations from Houston to Lake Charles (R. 29-32). He saw Doris Andrews in Hill's room shortly before 2 o'clock (R. 33, 43). A few days after Hill and Mrs.

McCarthy left, supposedly for Lake Charles, he saw Hill standing in front of a bus station in New Orleans (R. 35). A bell hop at the St. Francis hotel in New Orleans testified that Peterson and a lady checked into the hotel on a Sunday afternoon in August (R. 109). Additional witnesses called by the prosecution showed that immediately prior to the date of the crime the petitioner was indebted to numerous firms and that immediately after the date of the crime he paid his large bills ($303.55); bought a Cadillac for $2,650.00, of which sum $2,300.00 was paid in cash; deposited $1,000 in his banking account; purchased $378.20 in men's clothing; and went on a trip to Las Vegas (R. 127, 177, 178, 187, 194, 201, 208, 213, 218).

ARGUMENT

1. Petitioner contends that the court's charge failed properly to instruct as to the value of accomplice testimony and misdirected the jury because it permitted the jury to determine whether the accomplice testimony was corroborated, thus attaching to the other evidence in the case a significance greater than that to which it was entitled (Pet. 10, 11). As to the care with which accomplice testimony should be viewed, the court charged (R. 268, 269, 270, 271):

> * * * You are instructed that you may convict upon the testimony of an accomplice, but the testimony of an accomplice should be received with caution and scrutinized with care.
>
> * * * *

> Where an accomplice is a witness in the case, his testimony is subject to careful scrutiny. It should be carefully weighed to ascertain whether or not such a witness has a motive or interest in telling anything othe[r] than the truth. * * *
>
> * * * *
>
> * * * But I repeat that the testimony of an accomplice should not be received by the jury as that of an ordinary witness but ought to be received with suspicion and with the greatest of care and caution, to the end that no injustice may be caused in the acceptance of this testimony.

As to corroboration, the court said:

> Now, under the law, the federal rule is that a conviction may be had upon the testimony of an accomplice alone. In other words, it is not essential that the testimony of an accomplice be corroborated, but you do have the right to consider whether or not there is corroboration. If there exists a question in your mind to whether full effect should be given to the statements of such a witness, then you are entitled to refer to the whole case, the whole circumstances, as to whether or not the witness is corroborated by other evidence which is not so affected, by undisputed facts or circumstances which are presented in the case. If you find such corroboration in the case as a whole, then it is your right and your duty to give effect to that corroborative evidence in connection with the weight which you shall give to the testimony of such witness.

The first part of the charge shows that, contrary to petitioner's contentions, the court did charge

the jury on the value of accomplice testimony with perhaps more stress on the need for caution than the cases require.

The remainder of the charge, as quoted, merely advises the jury that they *may* find corroboration in other testimony if they believed it existed. Whether corroboration exists is a question properly left to the jury. See *Bennett* v. *United States*, 227 U. S. 333; *Brickey* v. *United States*, 123 F. 2d 341 (C.A. 8).

2. Jack Hill, petitioner's victim, was brought by the government from Atlanta on a writ of habeas corpus ad testificandum but was not called by the government. Petitioner argues that the failure to call Hill raises an inference unfavorable to the government which serves to render the entire testimony in the case as equally consistent with innocence as with guilt. Hill's testimony that he had been robbed would, at most, have been cumulative of the testimony of the persons who testified that they participated in the robbery, and the government was therefore not under a duty to call him. See *De Gregorio* v. *United States*, 7 F. 2d 295 (C.A. 2); *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631 (C.A. 2), certiorari denied, 329 U.S. 742. Moreover, Hill was present and available to the defense. Where a witness is available to both sides no unfavorable inference may be drawn against either party from the failure to call him. *United States* v. *Antonelli Fireworks Co.*, *supra*.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1958.

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